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NO. 81-66

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

FOREMOST INSURANCE COMPANY,
GRAND RAPIDS, MICHIGAN,
Petitioner

v.

PROGRESS MARINE, INC.,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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I

INFORMATION AS TO AFFILIATION OF CORPORATIONS REQUIRED BY RULE 28.1

Respondent's Parent Company:

Buttes Gas & Oil Co.

Affiliates of Respondent:

Buttes Resources Company
Nor-Am Exploration Corporation
Tribal Oil Corporation
Buttes Gas & Oil Co. International
Buttes Resources Canada, Ltd.
Buttes Resources Guinea, Inc.
Buttes Resources International, Inc.
Buttes Resources Tunisie, Ltd.
Sharjah Petroleum Corporation
Buttes Argentina S.A.
Unlimited Resources, Inc.
Juniper Petroleum Corporation
Crescent Petroleum Company
Buttes Resources Northern, Ltd.
Buttes Resources Guatemala, Inc.
Buttes Resources Nicaragua, Inc.
Buttes Resources Peru, Inc.
Buttes Resources Yugoslavia, Inc.
Progress Drillers, Inc.
Progress Drilling-A Company
Progress Drilling-B Company
Dolphin International, Inc.
Dolphin Casablanca Co. Inc.
DDA Company
DDB Company
Dolphin do Brasil Servicos do Perfuracoes, Ltda.
Dolphin Drilling Co.
Dolphin International S.A.
Dolphin International (S) Limited
Dolphin Drilling Supply Limited
Dolphin Drilling (UK) ltd.

Progress Drilling International, Inc.
Progress Supply, Inc.
Progreso Perforaciones Petroleras S.A.
Progress Perfuracoes do Brasil, Ltda.
Buttes Farmland Development Co.
Crescent Farms Company
Treegrove Management Corp.
Treegrove 1971 Management Corp.
White River Farms
Hills Valley Growers, Inc.
Valley Lemon Growers, Inc.
Cranco
Treecrop Company
1971 Treecrop Company
Crescent Engineering Company
Crescent International, Inc.
Humphreys Engineering Company
Al Hack and Associates
Crescent Export Company
Crescent Export Corporation
Creede Mines, Inc.
Pelican Flight, Inc.
Progressive Marine Insurance
Company, Ltd.

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BRIEF FOR RESPONDENT IN OPPOSITION

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because:

(1) There is no true conflict between holdings of the Second Circuit and Fifth Circuit for the reasons that (a) the two cases in question are factually different in several material respects and that (b) the so-called "holding" of the Second Circuit is actually mere dictum.

(2) An examination of the authorities cited by the Second Circuit for the proposition that the words "compulsory by law" in the insurance policy are "words of art" reveals that such authorities do not support the proposition. It is also true that Peti-

tioner's "expert" testimony on this issue in the trial court was not only inadmissible under the applicable authorities, but also was in conflict with Respondent's evidence on the same point. As such, the problem presented by the "expert" testimony is largely an evidentiary matter rather than an important federal question requiring resolution by this Court.

The Respondent, Progress Marine, Inc. (Plaintiff in the trial court) respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That decision is reported at 642 F.2d 816 (5th Cir. 1981).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The conflict in decisions suggested by Petitioner as a basis for seeking the writ of certiorari should not be regarded by this Court as a true conflict in decisions because the facts of the two cases are different in several material respects, and the language of the Second Circuit relied on by Petitioner as conflicting with the Fifth Circuit decision is mere dictum.

Petitioner relies on certain language in the opinion of the United States Court of Appeals for the Second Circuit in *Seaboard Shipping Corp. v. Jocharanne Tug Boat Corporation,* 461 F.2d 500 (2nd Cir. 1972) for the proposition that the words "compulsory by law" in the applicable policy of insurance preclude recovery of wreck removal expenses in the absence of an order of the United States government, a United States court or similar authority. Respondent respectfully submits that the language relied on by Petitioner to assert such conflict is in fact

not a decision at all, but is mere dictum or make weight material unnecessary to the decision in the case.

The Fifth Circuit all but so characterized such language when it stated on page 819 of 614 F.2d:

> "Although we incline strongly to agree with PMI that the quoted section of the *Jocharanne* opinion which discusses compulsory removal is mere dicta, we are unable simply to ignore the fairly unequivocal pronouncement by a distinguished Court so experienced in dealing with marine insurance."

In footnote five following the word "dicta" in the above quoted material from the Fifth Circuit opinion, the court said:

> "5. The vessel in *Jocharanne* was removed as part of 'sue and labor' activities. The vessel owner never attempted abandonment but rather had the vessel removed for the sole purpose of salvaging the hull. The 'compulsory removal' provision of the insurance policy, therefore, never came into play. 461 F.2d at 504, 1972 A.M.C. at 2154."

Additional reasons why the language in *Jocharanne* should be characterized as mere dicta are as follows:

> (1) The opinion in *Jocharanne* itself described the expenses in that case as "sue and labor" expenses, as distinguished from "wreck removal" expenses. (See Petition of Certiorari at B-5).
>
> (2) The protection and indemnity policy in *Jocharanne* agreed to reimburse *only* expenses paid by the assured, whereas in *Jocharanne* the expenses were paid by and on behalf of hull underwriters, who had no rights under the protection and indemnity policy. (See Petition of Certiorari at B-7, footnote 5).

(3) The protection and indemnity policy in *Jocharanne* expressly excluded coverage of expenses recoverable under the hull policy in the case, and the expenses in question, as sue and labor expenses, were most certainly so covered by the hull policy. (See Petition of Certiorari at B-7, footnote 5).

(4) At the time the expenses in *Jocharanne* were incurred, there had been no abandonment of the vessel and, therefore, there was no wreck to remove; hence, there could be no wreck removal expenses. (See Petition of Certiorari at B-7).

(5) There was an "other insurance" provision in the protection and indemnity policy in *Jocharanne* precluding recovery under the policy where there was other parallel coverage, as under the hull policy in *Jocharanne*. (See Petition of Certiorari at B-8 and 9).

There being all of the above bases, and perhaps others, for reversal of the trial court's judgment in *Jocharanne*, it would appear that the learned appellate court in *Jocharanne* added the language regarding wreck removal coverage (the dicta relied on by Petitioner in the case at bar) as a mere make weight or after thought and therefore as dictum.

In view of all of the foregoing, it is respectfully submitted that, far from having *decisions* of circuit courts in conflict, the only conflict here is between a dictum of the Second Circuit and the very carefully considered holding of the Fifth Circuit in the case at bar.

2. There being no legal authority other than the dictum in *Jocharanne* for the proposition that the term "compulsory by law" has the restrictive "words of art" meaning asserted by Petitioner, and the so-called "expert" testi-

mony in the trial court being in conflict, this Court should not disturb the well-reasoned opinion of the Fifth Circuit on this point.

The Fifth Circuit carefully examined the authorities cited by the Second Circuit in *Jocharanne* for the proposition that the words "compulsory by law" are "words of art" having the meaning asserted by the Second Circuit and found that the cited authorities do not support the proposition. (See 642 F.2d at 819). There being no other known legal or textual authority for this dictum of the Second Circuit, it would appear that there can be no real conflict between such dictum and the careful contrary holding of the Fifth Circuit. Furthermore, the conclusion of the Fifth Circuit is also supported by the text of Mr. H. L. Buglass (Heep L. Buglass, Marine Insurance and General Average in the U. S. (1973)) cited and quoted by the Fifth Circuit in footnote 7. at 642 F.2d 820, whereas no text material has been found supporting the position asserted in the dictum of the Second Circuit. All three of Petitioner's "expert" witnesses testified that they had never seen any textual material supporting the foregoing proposition asserted in dictum by the Second Circuit.

As to the so-called "expert" testimony cited and discussed on pages 16-19 of the Petition for Writ of Certiorari, there is first of all a substantial question as to the admissibility of such testimony for the reason that there was no evidence that Respondent's people had any knowledge of the so-called "word of art" meaning of the term advanced by Petitioner's "experts". In the absence of a predicate in the form of proof of such knowledge, the evidence was inadmissible. See 9 *Wigmore on Evidence*, § 2464 (3rd ed. 1940) where the following appears:

> "Where all the parties are members of the *same trade* or other circle of persons, little difficulty can arise; the only requirement is that the special sense alleged should be in fact a usage or settled habit of expression, and not merely the expression of a few persons or of casual occasions. (Citing cases). But when one of the parties is not a member of the trade or other circle, his acceptance of the standard must be made to appear (on the principle of § 2466, post). For this purpose, his *actual knowledge* of the particular sense as applicable to the transaction would suffice; otherwise it must appear to be so generally known in the community that his actual individual knowledge of it may be inferred. (Citing cases). The application of the general principle will then be a mere question of the probabilities of meanings for each case."

For cases so holding, the Court is respectfully referred to *New York Life Ins. Co. v. Federal Nat. Bank, Etc.*, 143 F.2d 69 (10th Cir. 1944), wherein the Court held an interpretation given to a term in a life insurance policy known only to the insurance company and not to the insured was not admissible against the insured. That the law of California, where Petitioner's policy was issued, is to similar effect is shown by the cases of *Lynch v. Bekins Van & Storage Co.*, 157 P. 822 (Cal. App. 1916); *Latta v. Da Roza*, 280 P. 711 (Cal. App. 1929); and *Exchange Lemon Products Co. v. Home Insurance Co.*, 235 F.2d 558 (9th Cir. 1956).

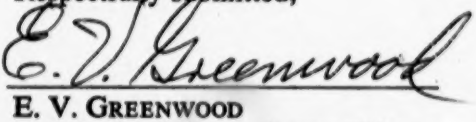
Not only was there a substantial question as to admissibility of this type of testimony under the circumstances of this case, there was also contrary testimony from witnesses Ellison and Hunt, the latter an expert on marine insurance called by Respondent in the trial court to rebut the so-called "expert" testimony received over objection by the trial court from the Petitioner.

In any event, it would appear that the problem suggested by all of this testimony, in the conflicting state in which it exists, is an evidentiary one and not a serious question of federal law that should concern this Court, particularly where the decision called in question is one that has been very carefully considered by a highly competent admiralty court showing clearly on its face that traditional rules regarding the interpretation of policies of insurance were strictly and fairly adhered to. Please see *Gray v. Zurich Insurance Company*, 65 Cal.2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966); *Fannon v. Travelers Ins. Co.*, 548 S.W.2d 460 (Tex. Civ. App.—Waco 1977, no writ); and *Walter v. Marine Office of America*, 537 F.2d 89 (5th Cir. 1976).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief for Respondent in Opposition filed on behalf of Respondent, Progress Marine, Inc., were duly served upon Petitioner, Foremost Insurance Company, Grand Rapids, Michigan, by placing same in the United States mail, first-class postage prepaid and addressed to Mr. Thomas A. Brown, Brown, Sims & Ayre, Suite 1735, 2000 South Post Oak Blvd., Houston, Texas, 77056, Attorneys for Petitioner in accordance with Rule 28.3 of the Rules of the Supreme Court, this 31 day of July, 1981.

E. V. Greenwood

E. V. GREENWOOD
Lead Counsel for Respondent